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CONSTITUTIONAL LIMITATION OF MUNICIPAL DEBTS.

The 8th section of the 9th Article of the Constitution of Pennsylvania ordains that "The debt of any county, city, borough, township, school district or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein, nor shall any such municipality or district incur any new debt, or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election in such manner as shall be provided by law; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum, in the aggregate, at any one time upon such valuation."

THE SEVEN PER CENT LIMIT.

The limit of 7 percent, upon the valuation is absolute in respect to boroughs[1], counties, townships, school districts[2]. The taxable valuation of the property of Millerstown in 1874 was $72,529. Seven percent of this is $5,077.03. Bonds were issued in that year to the amount of $5,077.03. They are said by Clark J., to have "swelled the indebtedness of the borough to the extreme constitutional limit[3]." "The debt of any county * * * shall never

[1]Millerstown v. Frederick 114 Pa. 435; Millvale Borough, Howard's Appeal, 162 Pa. 374; Davis v. Borough of Braddock, 48 Pitts. 145.

[2]An increase beyond 7 percent, even with a vote of the electors, would be void. Stevenson v. School Dist. of Waverly Borough, 6 Lack. Jur. 264.

[3]114 Pa. 435.

exceed 7 per centum," hence if there was a debt already existing when the constitution was adopted, no debt could be subsequently added to it which would make the total debt more than seven percent. The prohibition is not against making an increase of debt but making a debt of more than 7 percent[4]. If the debt on Jan. 1st, 1874 was already 7 percent or more there could be no increase of any amount except in the case to be hereafter noticed[5]. Seven percent of the valuation of Braddock borough was $397,-199.95. The existing debt was $315,770.70. It was proposed in 1900 to increase the debt by $85,114.43. This would make the total debt greater than 7 per centum. The increase was enjoined.[6]

WHEN SEVEN PERCENT LIMIT MAY BE TRANSCENDED.

The constitution provides that "any city, the debt of which now exceeds 7 percent * * may be authorized by law to increase the same." It will be observed that no county, township, school district, or borough, can in any case be authorized to make a debt in excess of 7 percent. A city only, can be thus authorized. It must be a city, whose debt, on Jan. 1st, 1874, already exceeded 7 percent. Philadelphia[7], Erie[8], were such cities. Such cities may be "authorized by law" to increase their debt. The 11th section of the act of May 23d, 1874, which divided cities into three classes, authorized the councils of cities of the first class, whose debt then exceeded 7 per cent of the valuation, to increase the debt one percentum upon such valuation. The increase of one percent thus authorized, could be validly made without obtaining the consent of the electors of Philadelphia[9]. "Whether it would have been necessary" says Paxson J., "to have submitted the question to a popular vote, had the increase [proposed] exceeded two per centum is a question about which we express no opinion"[10]. The constitutional

[4]Wheeler v. Phila. 77 Pa. 338; City of Erie's Appeal, 91 Pa. 398; Pepper vs. Phila., 181 Pa. 566.

[5]City of Erie's Appeal, 91 Pa. 398.

[6]Davis v. Borough of Braddock, 48 Pitts. 145.

[7]Wheeler v. Philadelphia, 77 Pa. 338. The debt was more than $60,000,000 The assessed valuation was less than $549,000,000.

[8]City of Erie Appeal, 91 Pa. 398.

[9]A later act authorized an additional increase up to 10 per cent of the valuation. This exhausted the power to authorize the city to increase its debt to 3 per cent beyond 7 per cent.

[10]Wheeler v. Philadelphia 77 Pa. 328, Pepper v. Philadelphia, 181 Pa. 566. The act was constitutional.

provision for the increase of the debt of cities whose debt in 1874 exceeded 7 percent of the valuation, is temporary. If of such a city by reduction of its debt, or by increase of its valuation, the debt ever declines below seven percent the exceptional provision of the constitution ceases any longer to operate. The city can never again so increase its debt as to make the total debt more than 7 percent, nor can it at any time, when its debt is already two percent, make any additions to it without a vote of the electors[11]. Hence, Philadelphia, having since 1874 increased its debt, which was already in excess of 7 percent, and having subsequently reduced it, so that it fell below 7 per cent of the valuation, but not below two per cent of the valuation, could not again increase the debt, even within 7 per cent without a vote of the people.

INCREASING DEBT, WITHIN SEVEN PER CENT OF VALUATION.

A debt of a municipality may within the maximum of 7 per cent be created by the ordinary governing power, without the authority of a vote of the people, unless some act of assembly requires such a vote. But the constitution of 1874 declares that it may not "incur any new debt or increase its indebtedness, to an amount exceeding two percentum" upon the assessed valuation of property; "without the assent of the electors thereof." The ordinary municipal authorities are not constitutionally prohibited from producing an indebtedness which does not exceed two percent of the valuation. The prohibition of increase without the consent of electors, applies, not merely to the production of a debt which itself is more than two per centum of the valuation[12] but to the production of a debt, which is less than two percent, but which, added to the already existing debt, will make a total debt of more than two per centum of the valuation[13]. "We will suppose" says Paxson J., "the debt to have been two percentum at the time of the adoption of the constitution. Two percentum

[11]Pepper v. Philadelphia, 181 Pa. 566.

[12]If the proposed debt itself is more than two per cent of the valuation a vote would be necessary without regard to any already existing debt; Luburg's Appeal, 1 Mona. 329; Major v. Alden Borough, 209 Pa. 247.

[13]In Pike Co. v. Rowland, 94 Pa. 238 Trunkey J. intimated, apparently, that if the increase did not exceed two per cent, a vote was unnecessary. Rice J., understands him differently, 109 Pa. 554. Appeal of City of Wilkes-Barree, 109 Pa. 554; Keller v. Scranton, 200 Pa. 130; McKinnon v. Mertz 225 Pa. 85. Brown's Appeal, 111 Pa. 72; Millerstown v. Frederick, 114 Pa. 435; Howard's Appeal 162 Pa. 374.

may be added by the municipal authorities, making the debt four per centum. No portion of the remaining three per centum can be added without the assent of the electors of such municipality, at a public election, in such manner as shall be provided by law".[14] "It is not" said Rice, P. J., "one specific increase of more than two per centum that is forbidden. It is an aggregate indebtedness exceeding that percentum that is prohibited"[15].

WHEN EXISTING DEBT HAS BEEN APPROVED BY VOTERS.

In Keller v. Scranton[16] it appeared that two per centum of the valuation was $462,420. The city had already a debt of $283,000 which had been incurred without a vote of the people, and a further debt of $299,000 which had been voted for. A debt that would possibly reach $100,000 was about to be added. Kelly J., thought, in deciding whether a vote of the people was necessary to authorize an increase, that if the two existing debts (that already authorized by vote, as well as the other) increased by the proposed new debt, would exceed 2 per cent of the valuation, a vote would be necessary to justify the new debt. Mitchell, J., declined to express any opinion on the question.

WHEN EXISTING DEBT HAS BEEN REDUCED BELOW 7 PER CENT.

The same principle regulates an increase of debt, of a city whose debt once exceeded 7 per cent, but which has fallen within 7 per cent, as of any other municipality. Hence, Philadelphia having reduced its debt from more than 7 per cent, to a per centum less than 7, but more than two, any increase, even within the 7 per centum, would require the approval of the electors.[17]

DEBT EXISTING AT GOING INTO EFFECT OF CONSTITUTION.

The constitution prevents the incurring of a new debt, or the increase of a debt, in excess of two percent, without the con-

[14]Wheeler v. Philadelphia 77 Pa. 338. If the existing debt is more than two per centum the borough cannot contract for a sewer the cost of which would increase the debt; O'Malley v. Olyphant, 198 Pa. 525. Two percent of the valuation was $4652.32. An issue of bonds for $12,000 would require a vote of the people. The existing debt was $1473.75. Clark v. Luzerne borough, 196 Pa. 210.

[15]Nankvil v. Yeosock. 7 Kulp, 518 Holtzman v. Braddock, 14 Dist. 547; Pepper v. Philadelphia, 181 Pa. 566.

[16]200 Pa. 130.

[17]Pepper v. Philadelphia 181 Pa. 566. But, in Brooke v. Philadelphia, 162 Pa. 123 this principle seems to have been overlooked. The existing debt $29,628,745 was nearly 4 percent of the valuation which was $769,930,542. It was assumed that a debt of $6,000,000 could be added without a vote of the people.

sent of the voters. Debts in existence, on January 1st, 1874, cannot therefore be considered, in determining the debt increasing power of any municipality. If the debt produced since will with the proposed debt, not exceed two percent a vote of the electors is not required[18]. If e. g., the debt existing Jan. 1st, 1874 is two per cent of the valuation, another 2 percent may be added without vote[19]. If a debt more than 2 percent, existed in 1873, but the debt added since is less than two percent then an addition up to two percent may be added, without a vote of the electors.[20] If since Jan. 1st, 1874, debts have been created which added together are more than two percentum of the valuation, no fresh increase may be made without a vote of the electors, although the increase added to the existing debts would produce an aggregate which if reduced by the amount by which the debt existing on Jan. 1st, 1874, has been reduced, would be less than 2 percent.

REDUCTION OF THE DEBT.

Possibly, when a debt equal to or more than 2 percent has been reduced below 2 percent, there can be a fresh addition up to two percent of the valuation without a vote of the people, but the mere fact that the sum of the debts prior to Jan. 1st, 1874, and of those since, has been reduced, so that the sum is now less than 2 percent, would not justify a fresh increase up to two percent, since some of the reduction might have been of the debt prior to Jan. 1st, 1874. A reduction of the debt prior to 1874 could have no bearing on the power to increase the debt. The debt of Lancaster on Jan. 1st, 1874, was $410,000. The present debt is $644,500, difference $234,400. Two percentum of the present valuation is $308,322.92. Although $73,922.92 would need to be

[18]Millerstown Borough v. Frederick, 114 Pa. 435; Appeal of city of Wilkes-Barre; 109 Pa. 554.

[19]Wheeler v. Philadelphia 77 Pa. 338. Appeal of city of Wilkes-Barre, 109 Pa. 554. Brown's Appeal, 111 Pa. 72; Houston v, Lancaster, 191 Pa. 143; Roye v. Columbia Borough, 192 Pa. 146.

[20]Hirt v. City of Erie, 200 Pa. 223. In Pike County v. Rowland, 94 Pa 238, a county debt more than 2 percent of the valuation, existed prior to Jan. 1st, 1874, and down to Nov. 5th, 1875, when bonds were issued by the county, in amount not more than 2 percent of the valuation. They were sustained, but apparently not because the debt prior to 1874, could not be considered, but because the bond increase was itself not more than 2 percent. A different interpretation was put on this case by Rice, P. J., in 109 Pa. 554.

added to $234,400 to equal $308,322.92, the debt cannot be increased by $73,922.92 without a vote of the people[21].

LIMIT OF INCREASE UPON VOTE OF ELECTORS.

The act of April 18th, 1895, amends the act of April 20th, 1874, so as to provide that if the return of the election of the people, upon the proposed increase of debt, "shall show a majority voting that debt may be increased, the corporate authorities of the municipality may increase the same to the amount named and specified in the notice given for the holding of such election for increasing indebtedness, to an amount not exceeding two per centum" etc. Under the act it was held that even with a vote of the electors, there could at any one time, be no increase to an amount exceeding 2 percentum. The valuation of Ephrata was in 1895 $794,337. The voters approved of the issue of bonds to the amount of $30,000, 3¾ per cent of the valuation. The issue of the bonds was enjoined[22]. It would require successive votes to increase the debt by $30,000. How soon might one vote follow the other?

THE MUNICIPALITIES.

The constitutional provision concerning increase of indebtedness, applies to cities[23], to borough[24], to counties[25], to townships[26], and to school districts[27].

VOTE UNNECESSARY.

If the preexisting debt added to the proposed new debt will not make the total debt more than 2 per centum of the valuation, the vote of the electors is not necessary to authorize the

[21]Houston v. Lancaster, 191 Pa. 143.

[22]Sener v. Ehrata Borough, 176 Pa. 80; Howard v. Olyphant, 181 Pa. 192; Stevenson v. School District, 6 Lack. Jur. 264; The act of April 13th, 1897, gives the municipal authorities power to increase the debt up to 2 percent without popular vote.

[23]Wheeler v. Philadelphia, 77 Pa. 338; Appeal of Wilkes-Barre, 109 Pa. 554; Keller v. Scranton, 200 Pa. 130; Brown v. City of Corry, 4 Dist. 645.

[24]Millerstown v. Frederick, 114 Pa. 435.

[25]Pike County v. Rowland, 94 Pa. 238; Brown's Appeal, 111 Pa. 72; Spangler v. Gallaher, 182 Pa. 277.

[26]Evans v. Willistown Township, 168 Pa. 578; Nankivil v. Yeosock, 7 Kulp, 518; Commoner v. County Commissioners of Dauphin, 23 C. C. 646.

[27]McKinnon v. Mertz 225 Pa. 85; Dolan v. School District, 10 Dist. 694. Luburg's Appeal, 1 Mona. 329; School District v. Shortz, 2 Penny. 231; Rebman v. School District, 201 Pa. 437.

new debt[28]. The act of April 18th 1895, required any increase of debt, even within 2 per cent, to be authorized by a vote of the people[29], but the act of April 13th 1897, P. L. 17, authorizes an increase not exceeding 2 percent of the valuation by a vote of the corporate authorities duly recorded upon its minutes. The act of June 14th, 1887, relating to the government of cities of the second class, prohibited any increase of the interest bearing bonded indebtedness of cities of the second class, unless the same should be approved by a vote of the qualified electors[30]. The act of March 7th, 1901, gives to cities of the 2d class power to borrow money to an amount not exceeding two percent, without a vote of the people[31]. That part of the existing debt which has been authorized by a vote of the people is not to be considered in determining whether the existing debt is so great that the proposed addition will make the debt in excess of 2 percentum[32].

NATURE OF THE DEBT.

The 5th section of the act of April 20th, 1874, P. L. 68, declares that, "The word indebtedness used in this act, shall be deemed, held and taken to include all and all manner of debt, as well floating as funded, of the said municipality; and the net amount of such indebtedness shall be ascertained by deducting from the gross amount thereof, the moneys in the treasury, all outstanding solvent debts, and all revenues applicable, within one year, to the payment of the same." A floating debt is as much contemplated, as a bonded. "A floating debt," remarks Gordon J, "usually ends in a bonded debt; and the former is as obligatory as the latter. What difference does it make to the overtaxed citizen whether the debt his property is confiscated(!) to pay is called floating or bonded"[33]. A "floating debt" of Waynesboro, of $15,200 was incurred when there was already a debt, to which it being added, the total debt became more than 2 percent of the assessed valuation. "Being unauthorized by

[28]Redding v. Esplen Borough, 207 Pa. 248; Bell v. Waynesboro Borough, 195 Pa. 299.

[29]Sener v. Ephrata Borough, 176 Pa. 80.

[30]Bruce v. Pittsburg, 166 Pa. 152.

[31]Jermyn v. Scranton City, 212 Pa. 598.

[32]Keller v. Scranton 202 Pa. 586.

[33]City of Erie's Appeal 91 Pa. 398; Redding v. Esplen Borough, 207 Pa. 248; Pepper v. Philadelphia, 181 Pa. 566; Booth v. Weiss, 15 Phila. 159.

the vote of the electors it was;" says Stewart P. J., without validity, at least to the extent of the excess[34].

SOURCE OF THE DEBT. TORT.

The debt may arise not from contracts only, but from torts. It includes "unliquidated damages sounding in tort," if the obligation to pay these damages has been created by an agreement. Two railroad companies agreed with the city of Scranton to construct and pay the cost of a viaduct, which should supersede a grade crossing, if the city should pay all damages to the abutting owners. These damages would probably reach $100,000. The contract thus created a "debt" and because, if added to the existing debt, it made the total debt more than 2 percent of the valuation, it was void, unless authorized by a popular vote[35]. "The taking or injury to land by eminent domain is not a tort in the sense of a wrongful act," remarks Mitchell J., though it is sometimes so termed. From liability for a tort in the ordinary sense, the constitution does not exempt a municipality how great soever its indebtedness. "But when as in the present case, the act which is called a tort is done under a contract, and the assumption of the consequent damages is an express term of such contract, we have a perfectly clear case outside of the principle that makes municipalities liable for their wrongful acts, without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration in the present." Probably if a municipality was about to commit a tort in the strict sense of that term, the effect being to enlarge its pecuniary liabilities beyond 2 percent, any taxpayer could obtain an injunction, as he could against contractual increases of debt.

BUILDINGS OF ANY KIND.

Debts may arise from the erection of buildings by the municipalty, and these buildings may be convenient, even, in a sense, necessary. Their meritoriousness, convenience, desirableness, does not excuse the creation for their erection, of a debt beyond two percent of the valuation, unless the people approve of such increase. The erection of this sort of building may be authorized by an act of assembly, or it may be within the implied powers of a municipality. Nevertheless if a debt arises therefrom, in excess

[34]Bell v. Waynesborough Borough, 195 Pa. 299.
[35]Keller v. Scranton, 200. Pa. 130.

of the limits of the constitution it is prohibited, unless the people authorize it. Of a market house it was said on argument that the building or renting of it was necessary for the convenience of the people of the city. Gordon J. answered "Let it be so; corporations, like natural persons, must do without conveniences, when they have not the money to pay for them. If the ordinary revenues of the city of Erie are not sufficient to meet its legitimate wants, and if it must continually take upon itself new obligations for that purpose, it is clear that bankruptcy and financial ruin must occur sooner or later, and when these do occur, it must learn, *nolens volens*, to live within its revenues. Therefore, it would seem to be true wisdom to grapple with this evil at once, for it only assumes a greater magnitude by procrastination. Be this, however, as it may, and conceding that in the sight of municipal officers this kind of wisdom is but foolishness, nevertheless it is the foolishness of the constitution of this Commonwealth, and so it must prevail'"[36]. Debts in excess of the constitutional limit, may not be created for the erection of water-works[37], of a school house[38], of an electric light plant[39], of a sewer,[40] of a viaduct to avoid grade crossings of railroads[41], of a court house[42], of an engine house and the purchase of fire apparatus[43], of bridges or the purchase of existing bridges[44] of stone abutments to an iron bridge[45]. Contracts not for the erection, upon municipal land of any of these structures, but for the hiring of them from others, e. g. a lease to a city of a market house for the term of 25 years, at an annual rental of $1500, would create a debt the first year, of $1500 and if that debt exceeded, with the

[36]City of Erie's Appeal, 91 Pa. 398.

[37]Dorrance v. Bristol Borough, 224 Pa. 464; Brown v. City of Corry, 4 Dist. 645; Sener v. Ephrata Borough, 176 Pa. 80: Clough v. Shreve, 10 C. C. 398.

[38]McKennon v. Mertz 225 Pa. 85; Dolan v. Lackawanna Township School District 10 Dist. 694.

[39]Howard v. Olyphant Borough, 181 Pa. 191; Clark v. Luzerne Borough, 196 Pa. 210.

[40]Redding v. Esplen Borough, 207 Pa. 248; McLaughlin v. Summit Hill Boro., 224 Pa. 425.

[41]Keller v. Scranton, 200 Pa. 130; Brooks v. Philadelphia, 162 Pa. 123.

[42]Brown's Appeal 111 Pa. 72.

[43]City of Wilkes-Barre's Appeal 102 Pa. 554.

[44]Bruce v. Pittsburg, 166 Pa. 152; Pike County v. Rowland, 94 Pa. 238.

[45]Nankivil v. Yeosock, 7 Kulp, 518.

existing debt, 2 per centum of the valuation, authorization of it from the voters would be necessary[46].

EXPENSE EXCEEDS CONTRACT.

A contract was made by a borough for the alteration of a street, at a cost of $14,665. Two percentum of the valuation was $15,023.30. There was already a bonded debt of $500. No vote of the electors was taken. Work was done under the contract, and in excess of it, and was paid for to the extent of $14,-960.97. The actual cost of the work done was $27,971. The total cost of the improvement, if completed, would be $33,000. The court at the suit of a taxpayer enjoined against the further prosecution of the work, until proper steps were taken for securing payment, by assessment upon property owners[47].

REVENUES APPLICABLE TO THE DEBT.

All revenues applicable within one year to the payment of any debt existing or about to be created, are directed by the 5th section of the act of April 20th, 1874, to be deducted from the debt in order to ascertain whether it requires a vote of the people, or whether it transcends 7 percent of the valuation. In City of Wilkes-Barre's Appeal[48] in order to learn whether the proposed increase of debt $62,000 would make the total debt more than 2 per cent of the valuation, from the existing debt, which was $139,980.56, were taken the money in the treasury, the outstanding solvent debts, and the revenues applicable within the year to the payment of it, found to be $63,602.39. The tax at the existing rate, not increased with a view to the debt in question, may yield a certain amount. Expenses of the usual and recurrent sort springing up from week to week, or month to month, will need to be paid from this product of the tax. If there will be an excess, sufficient to pay any part of the existing debt or of the proposed debt within the year, so much only of the debt as would remain after the application to it of this excess, will be considered as the actual debt, for the purpose of determining the validity of its creation. The balance of building

[46]City of Erie's Appeal, 91 Pa. 398.

[47]Hattman v. Borough of Emsworth, 53 Pitts. 52.

[48]109 Pa. 554. Says Mitchell J., "If the city has the money on hand or provides at the time a present means of raising it *otherwise than by loan* it may contract for expenditure without restriction." Addyston Pipe Co. v. City of Corry, 197 Pa. 41.

tax of a school district for the year 1875 still in the treasury in June 1876 was $384.48. For the year 1876 the tax was $871.60 and a further sum of $242.78, in all $1498.86. In June 1876 a contract was made for lumber for a school house, with Shortz, and later, the same year, other contracts, which eventuated in a liability to him of $1386.94. Hence it did not create an additional debt[49]. In Booth vs. Weiss[50] Philadelphia contracted with Weiss for the use of an engine house for ten years, at a certain annual rental. Mitchell J., refused to enjoin the payment of the rent, saying that when a city incurring an obligation either has the money actually in the treasury, or *has levied* a tax which in due course of administration will produce it, there is no prohibited increase of debt, though the obligation to pay and the actual payment are not strictly cotemporaneous. In Appeal of City of Erie, Gordon, J. quoted from Dillon on Municipal Corporations, as a "sound constitutional interpretation", the following "Where a contract made by a municipal corporation pertains to its ordinary expenses, and is together with other like expenses, within the limit of its current revenues *and* such special taxes as it *may* legally and in good faith *intend* to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts." Gordon J. adds, "If the contracts and obligations of a municipal corporation do not overreach their current revenues, no legal objection can be made to them, no matter how great the indebtedness of such municipality may be, for in such case, their engagements do not extend beyond their present means of payment, and so no debt is created."

REVENUE APPLICABLE WITHIN THE YEAR.

Revenues "applicable within the year" are to be subtracted

[49]School District of Denison Township v. Shortz, 2 Penny. 231. The fact that in the process of erecting the building other contracts were later made, and that all these contracts produced an aggregate debt in excess of two percent of the valuation, did not make the separate contract with Shortz void.

[50]15 Philadelphia 159. The city averred in its answer that its annual revenues were sufficient over and above payment of interest on debt and the ordinary expenses, to pay the rent. The court found that the money for the payment of rent for the current year had been duly appropriated and was actually or potentially in the city treasury. What the consequence of a different state of facts possible to arise thereafter might be, the court declined to speculate.

from the gross debt. A contract was made December 30th, 1893, for the erection of stone abutments of an iron bridge. The work was begun in June, 1894, and a bill was filed in July 1894, to arrest it. The indebtedness December 30, 1893, was in excess of 2 per centum, taking the revenues for the year 1893 as the revenues "applicable within the year". The court refrained from deciding whether, since the contract was to be performed in 1894, the revenues of that year should be deducted, since no evidence as to what such revenues were was offered. It intimated however that the revenues of 1894 could not be considered[52]. About April 17, 1900, the bonded debt of the Albion sub-school district (Pittsburg) was $144,000. Its assessed valuation was $7,354,680, two per cent of which was $148,093. About April 17, 1900, and at various times thereafter during the year, contracts were made for the purpose of completing a school house in process of erection. These contracts amounted to $40,000. None of them were completed in 1900 nor yet, when a bill was filed to enjoin against the execution of the contracts, and a levy of taxes. The court found them to be within the limit of current revenue; the levy of tax already made being sufficient to pay them in full as they would from time to time be performed, and to pay also the current expenses of the sub-district[53]. A contract for the electric lighting of the city for 7 years at an annual price of $1600 was held legitimate because that sum was "clearly within the ability of the city to pay from its current revenues"[54]. Revenues applicable in 1900, when the debt was to be increased, were as enumerated by Evans J., uncollected taxes of 1898 and 1899; paving liens; income from saloon licenses; water rents, street licenses, peddlers licenses, vehicle licenses,

[51]91 Pa. 398. The quotation is repeated in Wade v. Oakmont Borough, 165 Pa. 479. School District v. Shortz, 2 Penny. 231; Reuting v. Titusville, 175 Pa. 512. In Reuting v. Titusville, the city contracted in July 1895 for the paving of one block of a street, at a cost of $1600. Most of this was to be contributed by abutting owners. The estimated income for the fiscal year beginning April 1st, 1895, was from $8,000 to $10,000 in excess of the ordinary expenses of the city. This warranted the conclusion that the paving would leave no debt at the end of the fiscal year. There was also the additional fact that there was already a balance of revenue funds in the city treasury, of more than $12,000, applicable to all current expenditures.

[52]Nankivil v. Yeosock, 7 Kulp, 518.

[53]Mellor v. Pittsburg, 201 Pa. 397

[54]Wade v. Oakmont Borough, 165 Pa. 479.

bicycle licenses, taxes levied in 1900. The estimated expenses of the borough were to be deducted[55].

REVENUES APPLICABLE (CONTINUED)

The fact that the municipality has already by law the power to lay a tax which power it is not using at all, or using only to a small extent, when a contract is made, will not justify regarding that which might be produced within the year, by the exercise, or by the larger exercise of this power, as a revenue applicable within the year. In Dolan v. School District[56] where debts arose from a contract for a school building, it was urged that the new school board had the power, in about two months from the hearing, and after its organization, to levy a tax for building purposes not to exceed 13 mills. Edwards J. declined to consider this as a "potential asset". "Whether the school board" he observed, "will levy a one mill or a 13 mill building tax, or whether they will levy any, are matters entirely beyond our knowledge." The object of the constitution was, not to secure the payment of all creditors of municipalities, but to protect their inhabitants from excessive taxation, made necessary by debts. This object would be to a degree frustrated if all debts were held permissible for which payment within a year could be provided by the full exercise of the taxing power.

ASSESSMENTS.

The expense of certain improvements, e. g., sewers, grading and paving streets, may be imposed in whole or part, upon property owners, on the assumption that they will be correspondingly benefited. If the builder or contractor agrees to look solely to the properties for payment, to pay himself by the collection of liens, it is evident that no increase of the debt of the city or borough will result. The city or borough might then make the contract for the improvement without vote of the electors, whatever the magnitude of the existing debt[57]. The contract might impose a portion of the cost on abutting properties, the other

[55]Davis v. Braddock Borough, 48 Pitts. 145.

[56]10 Dist. 694. Still due on the tax duplicates of 1900, after deducting exonerations and commissions (= $400) was $4,381.98. This was an asset. The district owned lots, which had been used by it, but were now discarded for the new school house. The builder agreed to take these lots in part payment as equivalent to $1,000 unless the schoolboard otherwise disposed of them. The court refused to deduct the value of the lots from the debt. One of the expenses of the erection of the school house was $300 for the removal of the old building. It was a part of the new debt.

[57]O'Malley v. Olyphant Borough, 198 Pa. 524.

portion being readily payable from the current funds[58]. The part exclusively payable by the property owners would not be a debt of the city[59]. The city may agree to pay the contractor, but it may reimburse itself by liens filed against the abutting properties. These liens, if collectable within the year in which the city is to make payments, will be "revenues applicable within the year."

ASSESSMENTS INVALID.

When assessments are made in good faith, and at a time when they might lawfully have been made, so much of the debt as would be collectable by means of them were they in fact valid, will be ignored, in determining whether the debt is increased by the improvement, although, in fact it is not collectable. Altoona passed an ordinance for the paving of certain streets, at the expense of abutting property owners. The ordinance was void, because, in violation of the act of May 23d, 1889, concerning cities of the third class, it had been passed through both branches of the council on the same day. The cost of the paving fell therefore upon the city. The bonds issued by it are enforceable, notwithstanding the increase of the city debt occasioned by the failure of the municipal levies[60]. The city of Corry constructed a sewer, and assessed the cost of it upon properties benefited. Some of these properties did not abut on the street in which the sewer was. It was subsequently held that non-abutting properties could not be so assessed, and payment of the amounts assessed fell upon the city. The city was held liable, although its debt was thus increased beyond 2 per centum of its valuation without a vote of its people. Mitchell, J., remarks, "if means are adopted which in good faith, according to reasonable expectations, will produce a sufficient fund, the contract entered into on the faith of them, should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. Thus, if a city at the time of making a contract levies a special tax, in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values, the result is an insufficient fund, it cannot be held that the contract, good at its inception, would thereby be made bad. The constitutional restriction was not intended to make municipalities dishonest, nor to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance"[61].

[58]Redding v. Esplen Borough, 207 Pa. 248.

[59]Gable v. Altoona, 200 Pa. 15, Addyston Pipe Co. v. City of Corry, 197 Pa. 41.

[60]Gable v. Altoona, 200 Pa. 15.

[61]Addyston Pipe Co. v. City of Corry, 197 Pa. 41.

MOOT COURT

JOHN GIRARD V. AMOS TEMPLETON.

Assumpsit on Covenant of General Warranty.

STATEMENT OF FACTS.

Templeton by deed granted, bargained and sold a tract of land to Wilcox for $3,500. At the time there was a mortgage on the land for $2,000. The deed from Templeton contained a general warranty. Wilcox conveyed to Girard for $4,200. The mortgagee then foreclosed the mortgage and sold the land for $3,700. The purchaser at the mortgage sale demanded possession of Girard who yielded it. He now brings assumpsit on the general warranty. Defendant alleges that the covenant broken, if any, is one against incumbrances and that Girard cannot sue upon it. He has in fact not sued upon it.

BUCKLEY for Plaintiff.
HOFFMAN for Defendant.

OPINION OF THE COURT.

SAVIDGE, J. In ancient times it was usual to annex a warranty to the conveyance of lands, by which the grantor for himself and his heirs undertook to warrant and defend the same to the grantee. By the feudal constitution, if the vassal's title to enjoy the feud was disputed he might call the lord or donor to warrant and insure the gift, which, if he failed to do and the vassal was evicted, the lord was bound to give him a feud of equal value in recompense; 2 Black. Com. 300. Since that, however, a different mode of obtaining this object has been resorted to and adopted, by inserting in deeds of conveyance and of grant, what are usually called covenants of title. These covenants for title are five in number. (1) That the vendor is seized in fee. (2) That he has good right to convey. (3) That the purchaser and his assigns shall quietly enjoy. (4) For indemnity against encumbrances; and (5th) for further assurance. The simple means these covenants presented of carrying into effect the various intentions of parties, and the facility with which they were accommodated to the circumstances connected with titles soon occasioned their general use in practice. By this it is not to be supposed that a covenant of general warranty contains within it each of these five covenants. But it would follow therefore that a covenant of general warranty may either be considered as a covenant of seisin, of good right to convey, of quiet enjoyment, of indemnity against encumbrance, or further assurance, as may best suit the wishes of the vendee. 3 Penrose and Watts, 419.

In an action upon a covenant of general warranty contained in a deed of conveyance, in order to enable the grantee to recover he must allege in his declaration an eviction from the land conveyed. Proof of a better title

than that of the grantor and that the grantee gave up possession will not support the allegation of eviction. 11 L. R. A., 646.

Boone on Real Property says that a mortgage is simply regarded as a lien upon the property. The debt or obligation is the principal thing and the mortgage is only incidental, passing no estate in the land which can be taken in execution of the mortgagee's debt.

Templeton in this case was seized of the land conveyed, he had a good title and a perfect right to convey, and the $3,500 paid by Wilcox, while it may have seemed, in the absence of notice of the mortgage, which, in view of the general warranty, he was not bound to find out, a good bargain, yet, in comparison with the sale of the same land in execution for $3,700, there was a good consideration, and no possible fraud could be shown against Wilcox, or any liability imposed for his subsequent sale of the land for a reasonable profit.

Girard bought the land from Wilcox for $4,500, and upon his eviction by the execution of the mortgage, of which neither Wilcox nor himself had had notice, this action, on the general warranty contained in the deed given by Templeton, is properly brought.

If in this case the covenant broken, as the defendant alleges, is one against encumbrances, it can be sued upon, for in this case there was no notice of the encumbrance and until it was obtained no right of action accrued, but after notice it would become a chose in action and could not be assigned. 2 Johns 1.

The plaintiff in this case is not entitled to the full amount of his loss caused by the eviction and sale of his land under execution, for by paying the mortgage at time of execution, he could have shown constructive eviction, and by sueing on the general warranty obtained the price of the mortgage. Tiedman on Real Property 619.

And now, Jan. 8, 1910, judgment is entered for the plaintiff for $2,000 with interest from the time of his eviction.

OPINION OF THE SUPREME COURT.

A covenant of general warranty is a covenant against eviction. It is broken whenever there is an eviction under a paramount title.—8 A. and E. Encyc. 98; 11 Cyc. 1125.

Any title which, commencing before the conveyance, can be asserted with the effect of rightfully evicting the tenant under the deed, is a superior or paramount title and it has been therefore, frequently held that a covenant of general warranty is broken by an eviction under a prior mortgage upon the land. Andrews v. McCoy, 8 Ala. 920; Tuft's v. Adams, 25 Mass. 392; 11 Cyc. 1123 and A. and E. Encyc. 115, 118, and cases there cited.

In Brown v. Dickeson 12 Pa. 372 it was held that a covenant for quiet enjoyment was broken by a sheriff's sale under a paramount incumbrance. "The covenants of general warranty and quiet enjoyment are in the main identical and whatever constitutes a breach of one is a breach of the other." 8 A. and E. 98. The authorities cited and the analogy presented by the Pennsylvania cases establish that if Wilcox had been evicted by process of law the covenant of Templeton would have been broken.

The old English authorities were to the effect that there could be no breach of a covenant of warranty without an actual eviction by process

of law. This view was at an early date abandoned in England and has been generally rejected in the United States. It is well settled that if an outstanding title against which the tenant can offer no successful resistance is hostilely asserted the tenant may yield possession of the land to the person who claims it under the paramount title, without resisting him by force or by litigation and recover upon his covenant. Krepper v. Kurtz 58 Pa. 480; Sterner v. Baughman. If at the time of the foreclosure of the mortgage Wilcox had been the owner of the land and had yielded possession at the demand of the purchaser at the sheriff's sale he would, therefore, have been entitled to recover.

The covenant of warranty is universally treated as a covenant in futuro. It is intended for the benefit of the ultimate grantee in whose time it is broken and he may maintain an action thereon in his own name. De-Chaumont v. Forsythe, 2 P. & W. 507; Williams v. O'Donnell, 225 Pa. 321.

The contention that the covenant was broken at the very instant it was made and therefore did not run with the land cannot be sustained. A covenant of general warranty is not broken by the fact that there is an outstanding encumbrance on the land if no steps have deen taken towards its enforcement. 8 A. & E. Ency. 100. To constitute a breach there must be an eviction under a paramount title. The breach does not occur until there is an eviction and until then no right of action arises.

In accordance with these principles Girard was entitled to sue and recover upon the warranty. The sole remaining question is raised by the ingenious and double-barreled argument by the counsel for the defendant, to wit: that if Wilcox purchased without notice of the mortgage he took the land free from the lien of the mortgage and therefore the mortgage was not a paramount title and, on the other hand, if Wilcox purchased with notice of its existence, "he would have to abide by his acts."

In answer to the first half of this argument it is sufficient to say that if Girard was not made a party to the foreclosure proceedings the contention of the counsel would be correct. It is well established that where the terre tenant has not been noticed in the sci. fa. proceedings he is entitled to make any defence to an action by purchaser at sheriff's sale which would have been available as a defence to the sci. fa., P. & L. Dig. vol. 12c. 21007, and in this case as Girard yielded possession without waiting to be actually evicted he took upon himself the burden of proving that the title to which he yielded was in reality a paramount title. 8 A. and E. Encyc. 116. To do this he would have to prove that he purchased with actual or constructive notice of the mortgage. This he has not done. It does not appear however, that Girard was not a party to the sci. fa. proceedings and the statement of facts is consistent with the theory that the mortgage was a lien upon the land as against Wilcox and his grantee Girard and this theory is adopted by this court on deciding the case.

As to the other half of the counsel's argument, we cannot see how the fact that Wilcox knew of the existence of the mortgage should preclude a recovery upon the covenant. The very fact that Wilcox knew of the existance of the mortgage may have induced him to secure the warranty in order to protect himself should he be evicted by proceedings under the mortgage. "A vendee may take a covenant against a known defect in the title." Cathcart v. Bowman 5 Pa. 317. Am. Dig. Vol. 12 p. 75 and 40.

The fact that in addition to the covenant of general warranty there was in the deed a covenant against incumbrances in no wise impaired the force of the general warranty.

The principal questions arising in this case are discussed in Williams v. O'Donnel 225 Pa. 321.

Judgment Affirmed.

COMMONWEALTH v. HARRISON.

Wrongful Intent Formed After Possession is Acquired.

STATEMENT OF FACTS.

Harrison went into the store of James and asked James to change a $20 gold piece. James gave Harrison a roll of money which he, James, supposed to contain 20 one dollar bills but which in reality contained 20 five dollar bills. On arriving at his home several hours later Harrison discovered the mistake and determined to convert the entire amount to his own use and did so.

BRENNAN for Commonwealth.

LOKUTA for Defendant.

OPINION OF THE COURT.

DIPPLE J. Neither of the learned counsel seems to be able to support his argument by a Pennsylvania decision which is in direct point with the case at bar and we have come to the conclusion that there has been no case decided in Pennsylvania in which the facts coincide exactly with this case.

Without a doubt great wrong has been done in this case but the question is can the prisoner be convicted under the indictment for larceny?

The Pennsylvania statute names the punishment for larceny but does not define it. Larceny is defined in Clark's Criminal Law, page 271 to be the taking of and removing by trespass of personal property, which the trespasser knows to belong either generally or specially to another with the felonious intent to deprive him of the ownership thereof.

In the present case the defendant took the property and later concluded to appropriate it to his own use. But can he be said to have taken the property by trespass and did he have the intent to deprive the owner of his property permanently.

In Regina v. Ashwell, a crown case, (Beal's Criminal Law 566) decided in 1885, where the prosecutor gave the defendant a crown in mistake for a shilling and the defendant appropriated it, he was held guilty of larceny. But the judges were divided, four deciding that he was and four that he was not guilty of larceny.

In Commonwealth v. Eichelberger 119 Pa. 254, a party was convicted of larceny, where he had called at the bank to renew a $1660 note, and paid the discount for 90 days and handed the cashier a note for $16, and the cashier by mistake or oversight, supposed it was $1600 and gave up the

note with an indorsement thereon. In this case the felonious intent evidently existed at the time of receiving the note for $1600.

In Cooper vs. Com. of Ky. where a cashier of a bank gave a party a roll of small coin wrapped up in paper saying. "There are twenty nickels in change" and subsequently the party receiving the same, having gone a distance of four squares, discovered that it contained 20 five dollar gold coins instead of nickles, and kept the money, it was held that there was no larceny unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands. This decision is in accord with the weight of authority.

The larceny and intent to steal must exist at the time of the taking, and where the defendant took the property innocently under a mistake of fact, and thereafter converted it to his own use, with a felonious intent, he was not held guilty of larceny. People v. Miller 4 Utah 411.

To constitute larceny by retaining money paid by mistake in giving a $10 bill for a $1 bill, the receiver must have known at the very time that he received the money that he was receiving too much and more than was intended for him, and must have intended to convert the money to his own use. Baily v. State 58 Ala. 414.

In Com. v. Barrett, 28 Pa. Super. Ct. 112, where a party represented that he was also to receive the money for another fellow workman and thereupon the prosecutor wrote him out a check for the sum due both and the defendant later appropriated the money to his own use without turning it over to his fellow employee, Justice Porter in his opinion states "that every larceny includes a trespass from whence it follows that if the party be guilty of no trespass in taking the goods he cannot be guilty of felony in carrying it away."

The weight of authority is clearly to the effect that where property is obtained by mistake, as in this case, and subsequently the mistake is discovered by the receiver, who thereupon converts the property to his own use, it is not larceny. The effort of some Courts to make it larceny has developed a line of metaphysical reasoning that seems incongruous and hardly sound; such as that there is no possession until knowledge of the mistake; that there is no delivery until the mental intention to appropriate by the receiver and therefore, the intent, appropriation and receiving are simultaneous. In other cases it is assumed that when the mistake is ascertained the holder stands in the attitude of the finder of lost property, knowing the owner, In other cases it is held that the "property" in the goods has not been parted with.

There is no question but what the receiver of property given him by mistake is guilty of larceny if at the time he receives the property he discovers the mistake, and then and there forms the intention to appropriate it to his own use, and thereafter retains the property.

The testimony in this case clearly proves that Harrison did not take the property by trespass and that he did not know of the mistake until he arrived at his home. Therefore he could not have had the felonious intent at the time of taking and we are satisfied that he cannot be held guilty of larceny. We therefore accordingly direct the jury to return a verdict of not guilty.

OPINION OF THE SUPREME COURT.

In Regina v. Ashwell, 16 Cox 1, Beale 566, a case on all fours with the case at bar, the court of fourteen judges was evenly divided upon the question whether the defendant was guilty of larceny, and as a consequence of this equal division the conviction was affirmed. The theory of the judges who voted to sustain the conviction was that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property there was a taking possession simultaneously with the formation of that intention.

This was the construction given to Regina v. Ashwell in the later case of Regina v. Flowers 16 Cox 33, Beale 574. The facts of this case were similar to the facts of the present case and the Recorder ruled in deference, as he said, to the opinion of certain of the judges in Regina v. Ashwell, that if the prisoner received the money innocently but afterwards appropriated it to his own use he was guilty of larceny. The prisoner was convicted and the conviction was reversed. Lord Coleridge, C. J., said, "In that case [Regina v. Ashwell] the judges who decided in favor of conviction never meant to hold that the appropriation of chattels which had previously been innocently received should amount to larceny. I myself assumed it to be settled law that where there has been a delivery of a chattel from one person to another, a subsequent appropriation will not make him guilty of larceny. The judgment of those judges who opposed the conviction, if carefully read, shows that they considered that to justify a conviction for larceny there must be a taking possession simultaneously with the formation of the fraudulent intent to appropriate. To the same effect was the opinion of Manesty who had voted to sustain the conviction in Regina v. Ashwell.

In a still later case Regina v. Hehis, 2 Irish Reports 709, where the facts were identical with the facts of the present case it was held that the defendant was not guilty of larceny. Four of the nine judges dissented on the ground that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession.

The question in dispute in cases of this kind therefore seems to be, when does a man acquire possession when a coin of large value is delivered to him by mistake for one of smaller value?

This court thinks that he acquires possession when the coin is delivered to him. If the person delivering the coin does not intend to deliver possession at that time what does he intend to deliver. In Regina v. Ashwell, Care, J., said, "I believe the cases establish the principle that a man has not possession of that of the existence of which he is unaware." But certainly when a coin is delivered to a man it cannot be said that he is unaware of its existence simply because he is mistaken as to its value.

The cases discussed in Regina v. Ashwell may be reconciled by *holding that a person takes possession of an object only when he assumes physical control over it but does so with the intent to control that object either as a specific object or as one of a class.* In the present case the defendant when he received the money did so with the intention of assuming control over the specific object delivered him and he therefore acquired possession at that time.

The decision of the court is that the defendant was not guilty of larceny. In support of this decision in addition to the authorities cited by the learned court below the following authorities may be cited. Regina v. Middleton L. R. Q. C. C. 38 Beale 617, Jones v. State; 97 Ga. 430; 25 S. E. 319; Thompson v. State, 53 S. W. 330; Rex v. Muchlow, 1 Mod; 160 Beale 547; 25 Cyc. 43; 18 Am. & Eng. 481.

The subject was discussed and the cases collected in a note in 52 L. R. A. 136.

LA MOTT V. SANDERSON.

Action for Damages—Negligence in Obstructing Highway.

STATEMENT OF FACTS.

Sanderson owned a pile of wood. One corner extended over the highway, though not the travelled portion, for about two feet, but there was left sufficient room in the highway for the ordinary use thereof. While the plaintiff's wife was driving along the road, the horse became frightened by a train and started to run. When the woodpile was reached, the buggy struck the part extending into the highway, and the buggy was overturned, and the plaintiff's wife was thrown with such violence as to cause her death. The husband brings this action for damages.

BRENNAN for Plaintiff.

FELTON for Defendant.

OPINION OF THE COURT.

STRAUSS, J. Upon this statement of facts, plaintiff is entitled to recover, if the wrongdoer was the proximate cause of the injury and provided there was no contributory negligence on the part of the plaintiff.

In Hoag & Adler v. Lake Shore & Michigan Southern Railroad 85 Pa. 293, the court held, as the true rule for determining what is the proximate cause that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

Here the defendant was a wrongdoer in that he had let the woodpile extend into the highway for an unreasonable length of time. The road being traveled by teams it is not unreasonable to expect that there will be one or more runaway teams in any considerable time.

In Fergus Lane v. Atlantic Works, 111 Mass. 136, the court held, in an action to recover for injuries caused by the defendant's negligence, to which the fault of another person contributed, the defendant's liability is not affected by the fact that the fault of such person was not negligence but voluntary wrongdoing if it was conduct which the defendant should have apprehended and provided against.

Here we think the defendant could have foreseen that a runaway team would sway to and fro and would be just as likely as not to run into the

woodpile. The defendant's negligence was then the proximate cause of the plaintiff's injury.

In Miller vs. Electric Light Co. 212 Pa. 593, the facts agree with the case at bar. The defendant's employe left an arc-light lowered in the street in the care of a small boy while he went for a file. In his absence a one horse sleigh was driven at a rapid pace around the corner. The horse struck the wires of the lamp and the wires in turn struck the plaintiff who was crossing the street at the time and injured him. The question was left to the jury whether defendant's conduct in lowering the lamp or leaving it in charge of a boy while the wires were down, was negligence or not, and the jury found it was.

This we think is even a stronger case than the one at bar for there the nuisance was being watched while in the case at bar it was not.

In the above case the court also found that there could be no custom of the defendant which would excuse him for exposing the public to what the jury found to be unnecessarily dangerous. This we think will sufficiently answer defendant's argument respecting custom,

Toole v. Pittsburgh and Lake Erie Railroad 158 Pa. 99, holds, where a train of cars on a steam railroad collides with a street car at a grade crossing and a passenger in the street car is injured, both companies are answerable to the passenger if they are both negligent and the passenger may maintain his suit against either. If the collision was the result wholly of the negligence of the Street Car Co. the railroad is not liable. So here since no negligence can be shown on the part of the deceased woman, and since the defendant's negligence was the proximate cause of the injury, the plaintiff is entitled to recover.

OPINION OF SUPERIOR COURT.

The owner of premises contiguous to a highway, has no right to annex a part of the highway to his curtilege. Certain transient uses of it are allowed. Smith v. Simmons, 103 Pa. 32; Rafferty v. Traction Co., 147 Pa. 579; Allegheny v. Zimmermann, 25 Pa. 287; N. Manhein Township v. Arnold, 110 Pa. 280; but from this toleration, cannot be inferred the right to occupy a road with a woodpile, or to cause the woodpile to project two feet into it. Cf. 1 Trickett, Crimes, p. 213; Railway Co. v. Cox, 2 Mona. 140. Although the township may not be bound to keep in good condition for travel, the entire width of a road, it follows not that private persons may put obstacles to travel upon any portion of it. The deceased had a right to the non-negligent use of the entire width of the road, in case of emergency valid against this defendant.

In ordinary circumstances, the deceased would have been under a duty to avoid the woodpile, although its presence in the road was a nuisance. Proper care would have dictated such avoidance. But the horse became frightened by a phenomenon which was not under her control. So far as appears, she was not negligent or unskilful in the management of it, in its moment of alarm. The collision with the woodpile was by her unavoidable. That collision would not have occurred if the pile had not been there. The defendant then furnished one of the causes or conditions of the accident, and his doing so was a tortious act. Was its connection with the accident too remote?

It has often been held that one who causes a state of a highway which co-operating with a runaway or other event, produces an accident is responsibly related to the accident. Municipalities have been held liable for accidents occasioned by the absence of barriers, the proximity of embankments, or declivities, the making or non-repair of holes, the non-removal of ice. 13 P. & L. Dig. 22058. Private persons are equally responsible.

That, if a carriage collides violently with an immovable obstacle it will be overturned; that, if so, grave injury to its occupants will result, are not so improbable that they should not be anticipated. That horses easily take fright, at loud and violent noises, or the apparition of large and unusual objects, should be known, as also that, when frightened they become violent and uncontrolable. We see no reason for doubting that the woodpile was sufficiently near causally to the collision and its results, to make the placer of it on the road, responsible for the results.

Judgment affirmed.

WILLIAM SHALTERS V. JACOB HARVARD

Assumpsit for Rent. —Business for which lease was taken has been made illegal.—Premises Vacated.

STATEMENT OF FACTS.

Shalters leased for four years a building to Harvard in which at the time and four years before liquors had been sold under a license.

The lease stipulated that the building was to be used as a saloon. After the lease was made and Harvard had been in possession nine months selling liquor, the county voted under the local option law that there should be no liquor selling. Thereupon all outstanding licenses lapsed. Unable to sell liquor any longer Harvard at the end of the first year vacated the premises. At the end of the second year Shalters who had made no effort to obtain another tenant sued for the second year's rent: viz $600.

MARSHALL for Plaintiff.

MCKINNEY for Defendant.

OPINION OF THE COURT

WATKINS, J. This was an action brought by a landlord against his tenant for rent. The defendant claims that he should be relieved from paying the rent for the fact that since he was not allowed by law to continue his saloon business, he was excused.

I have inferred from the facts of this case that local option must have been in force before in the section in which this building was located and since the lessee was familiar with this fact he should have required the lessor to stipulate in the contract that in case of local option he should be excused from paying the said rent.

But in case local option had never been in force in that section he should have stipulated for the exemption should he be deprived of liberty to sell liquor as he would should he desire exemption if the buildings should be destroyed by fire.

In 2 Penny. 367 it was held that where fire destroys a building without any fault of lessor, the lessee is liable for rent, for the unfinished term.

Destruction of a barn on a leased farm, of a leased store or house does not excuse the tenant from paying rent. Trickett on Landlord and Tenant, 77. If this building had been destroyed by fire the lessee would have been liable, therefore I can not see any reason, why the act of law would excuse him, for here the lessee could have enjoyed the benefit of this building, he could have turned it into any kind of a store, or could have sublet to another tenant.

There is nothing in the facts that state that plaintiff had the right of re-entry or forfeiture of building had the lessee refused to continue the business of liquor selling.

That the building was to be used as a saloon is a covenant rather than a condition: therefore if the lessor had ousted the lessee from the premises, the lessee would have an action for damages against the lessor, but here the landlord was neither guilty of a breach of the covenant nor did he do any act to oust the tenant from possession, nor was he instrumental in obtaining the passage of this local option law. Lessees are not relieved from liability for rent by city ordinances restricting uses of leased property since they are not thereby deprived of the beneficial use of the premises. 24 Cyc. 1148.

41 La Ann. 281; 6 So. 529 holds that where there is no express warranty against the "acts of the law," the lessee is not relieved from his obligation to pay rent because of the enactment of the law by which he is deprived of the use of the premises.

10 Misc. (N.Y.) 718,31 N. Y. Supplement 818, holds that an ordinance forbidding a sale of liquor within 200 ft. of a church or school-house passed after the execution of a lease for saloon purposes of premises within such description but before the commencement of the term does not relieve a lessee from liability of rent, as he is not by such ordinances deprived of beneficial use of the premises.

Upon the above law we are obliged to render judgment for plaintiff.

OPINION OF SUPERIOR COURT.

The lease was for four years. The first year's rent had been paid; the second year's not. This is an action for the latter. Why should it not succeed?

Harvard vacated the premises at the end of the first year, but the duty of paying rent, does not depend on the tenant's taking or retaining the possession.—Trickett, Landlord and Tenant, 142.

The only excuse for the non-payment of the rent, that could plausibly be urged, is the inability of the tenant to use the premises for the sale of liquor. When he accepted a lease of them, he knew that the power to continue to sell would depend on the obtaining of a license. That would depend upon the continuance of the license law, and upon the continuance of his ability to satisfy the license court of the fitness of himself and of his place, and the necessity of a license to sell there. He took the risk of this continuance. He remains liable for the rent, although he has lost the license to sell liquor. Teller v. Boyle, 132 Pa. 56;

O'Byrne v. Henley, 50 Southern, 83 (Ala.) Miller v. Maguire, 18 R. I. 770.

There was no duty upon the lessor to search for a substitute tenant, and to suffer an abatement from the contractual rent of what might have been obtained from another tenant. Miller v. Becker, 96 Pa, 182; Lipper v. Bouve, 6 Super. 452.

The lease stipulated that the building was to be used as a saloon. If this is a condition subsequent to the tenant's estate it is suspended by the passage of the law making sales of liquor legally impossible. It connot be construed into a condition subsequent to the tenant's duty to pay the rent agreed upon. O'Byrne v. Henley, *supra*. The tenant has an estate in the land for four years. Instead of paying for it in one sum, at the commencement of his posession, he pays in annual instalments. Had he paid in one sum, his loss, by the operation of the law, of the power to use the premises in the expected mode, would have given him no right to recover back all or part of the money. The circumstance that the money has not yet been paid, bestows no right to with-hold it or any portion of it.

Judgment affirmed.

WM. HOLTON V. SAMUEL GRACE.

Lease with Option to Purchase—Replevin

STATEMENT OF FACTS

An agreement is entered into between these two parties, whereby Grace is to have the use of the safe for two and a half (2½) years at a monthly rental of $10., and at the expiration of this term, provided that all these installments are paid, he is, upon paying an additional dollar, to have excuted to him a bill of sale.

EDWARDS for Plaintiff.

O'BRIEN for Defendant.

OPINION OF THE COURT

GILBERT, J. Grace gave a note for $300. payable 2½ yrs. after the beginning of the lease, i. e. at the expiration of the term, the purpose of which we interpret to be as a security collateral to the performance of the principal obligation. The principal obligation of this contract is the payment of the thirty (30) monthly installments, or $300., the discharge of which will cause the collateral security to fail.

There is no stipulation in the agreement for the remedy of the vendor bailor in case of default of payment of any of these monthly rentals. Altho only six installments were paid, yet the vendor-bailor, relying on the collateral security and the good faith of the vendee-bailee for the balance of the rentals according to the agreement, lived up to his part of the contract and permitted him to retain the possession of the safe until the term has expired.

Over two and a half (2½ yrs.) years have elapsed; the term has expired; twenty-four (24) installments of rent are overdue; and Holton,

relying on the collateral as a means to obtain the balance of the rent, sues upon the note. He obtains judgment, but on execution satisfaction is not obtained. Now the question arises, is Holton precluded from bringing an action of replevin?

We think he is not.

By entering into this agreement Grace implies his wilingness to pay the monthly installments, his sanction that the title should remain in Holton until the thirty (30) installments and an additional dollar have been paid, and that the note shall be an additional security for the payment of the full term of rent.

Altho Grace had only paid six (6) monthly installments, he has enjoyed and has used the safe as though he had fully complied with the terms of the contract, and had been prompt in his payments. In the meantime Holton held a copy of the agreement and a note for $300. payable at the end of the term. Turning to the agreement he could find no remedy, short of rescission, in it; on the other hand the note would avail nothing since it would not mature until the end of the term.

Grace was prompted by one of two motives; good faith or bad faith, if the latter no time need be spent puzzling over distinctions in order to do justice to him; if his conduct was actuated by good faith he either was unable to pay the monthly installments, or he relied upon the note being sufficient to indemnify the plaintiff for the monthly installments. Being unable to pay the installments when due his proper act should have been to have offered to return the safe to the lessor, which he did not do, but continued using it as if he had fully complied with the contract. Relying on the note to renumerate the lessor for the unpaid rentals, his duty was to make the note good when it matured, for it was given as a collateral for the monthly installments.

Since Grace has not offered to return the safe, although he made no monthly payments after the sixth (6) installment; and since he did not pay the note at maturity, when there were twenty-four (24) unpaid installments; and since he still has the possession and the use of the safe; we think Holton is entitled to some remedy, because the title is still in him.

Had Grace lived up to his part of the contract Holton would have received $300. As the case now stands Holton is out $240., while Grace for $60. has had the use of the safe for which he agreed, in the contract, to pay $300. Had Grace paid the thirty (30) monthly installments, or had the $300. note been paid still the title would have remained in Holton, for the condition precedent to the execution of the bill of sale was the payment of an additional dollar.

Holton has kept his part of the contract. He has permitted Grace to retain the possession of the safe to the end of the term thus carrying out his part of the contract, which enables him to sue for the note given to secure the amount of the rentals for the term. He sues upon the note but upon execution it has not been satisfied.

Since Grace has had the use of tne safe throughout the term; and since he has made only six (6) payments; and since the note, given to secure the monthly installments, has not been paid he now brings an action of replevin, and should not be denied the right.

In Levan v. Wilten, 135 Pa., 61; it is held "that a note given for an existing debt is not payment, unless it be expressly accepted as such. The persumption is that it is not payment unless it is itself paid."

The title to the safe is, and until $301. has been paid, will be in Holton and giving the note did not make any change in that respect. The facts in this case contain nothing, by way of an express stipulation, to overcome this presumption of law.

The time for payment in full, not only of the principal obligation but also of the collateral, has passed; the title is still in the vendor-bailor, and now the resumption of posession is a reasonable exercise of the right of rescission of the conditional sale.

Many are the cases in which the courts hold that the remedies of the vendor are not cumulative but alternative. Holton has sued upon the note in accordance with the contract, the note has not been paid, which according to the principle laid down in Levan v. Wilten *supra*, passes no title, nor does it give Holton any remedy (redress for the wrong).

A. must either starve or work. He obtains work from B. Unless he receives renumeration for his work he will starve, therefore it is the renumeration and not the work which will afford him relief from starvation. Again, A. having symptons of typhoid fever goes to a physician for a remedy. Unless the treatment results satisfactorily he gets no relief. It is not the act of going to the physician, but the resulting relief which constitutes his remedy. Now reasoning from these, we think that, since the note was not satisfied, Holton has received no remedy.

Since in Sherban v. Gerdy, Law Review Vol. XIII, No. 7. pg. 227, Gerdy resumed possession of his chattel by replevin notwithstanding the fact that over two-thirds of the consideration had been paid, we think, bearing in mind that the unpaid note passed no title to the vendee-bailee, that the payment of less than one-sixth of the consideration should not prevent Holton from bringing replevin.

The cases cited by the counsel for the plaintiff are not exactly appliable to the case in hand, for they all pertain to suits on the collateral, in accordance with the contract, after the contract has been rescinded by repossessing the chattel; i. e. suing upon the collateral after the principal obligation has been discharged.

In Campbell v. Hickok, 140 Pa., 290. "the decision is based on the stipulation of the contract that the lessor had the right, on the lessee's failure to pay any installments, to reposses himself of the property, and having exercised this right the contract was rescinded and there was an end of the personal obligation on the part of the lessee."

In Seanor v. McLaughlin, 165 Pa., 150. "the plaintiffs rescinded the contract, by retaking into their possession the subject of it, entered judgement on the bond and issued execution on the other property of the defendant, which they had no right to do, for the contract, or obligation, to which the bond was a collateral, no longer existed.

In Road Roller Co. v. Schlimme, 220 Pa., 413, "There was one condition imposed upon the Plaintiff Co.,—if it took possession of the machines and thereby rescinded the agreement it could not demand payment of the unpaid installments. Plaintiff removed rollers in pursuance of contract which permitted such action on failure to pay consideration

money. This act was a rescission of the contract and deprived plaintiff of any right of action on the contract, or on notes, to enforce payment of the money stipulated to be paid in the agreement. Plaintiff can not retain the machines and at the same time demand payment of value.

Holton finding that by following the terms of the contract he was losing money rescinds, while in the previously mentioned cases the plaintiff rescinded and then tried to enforce the terms of the contract.

Since there would have been no question concerning Holton's right to maintain replevin had the note not been executed; and since the unpaid note passed no title, but permitted it to remain in Holton; and since the unsatisfied execution affords no remedy for Holton, therefore, we think he should be permitted to have the safe, and judgment is hereby entered for the plaintiff.

OPINION OF SUPERIOR COURT.

Holton "leased" the safe to Grace, who bound himself to retain it 30 months, or at least to pay the rent for it for 30 months. At the end of 30 months he had the option to return it, or, paying an additional $1 to retain it as owner. He has kept it more than 30 months. He has not tendered the additional dollar. He has even not paid 24 of the 30 installments of rent. Why then should Holton not be allowed to recover the safe?

He sued on the note for $300, and obtained judgment for $240 and interest. Had this judgment been paid, the payment would have satisfied the claim for the rental, but it would not have dispensed with the necessity of Grace's paying the additional dollar in order to entitle himself to retain the safe. But the judgment has not been paid. Grace has had possession of the safe for more than 30 months, and he has paid but $60.00.

The learned court below has properly held that Holton may recover the possession of the safe by means of the action of replevin. In doing so he rescinds no contract. The bailment was for 30 months, and that time has elapsed. It is now the contractual duty of the bailee either to return the safe, or to make it his by paying the arrears of the rent and supplemental dollar. This he has not done, in the considerable time that has followed the expiration of the 30 months. It needs no authority to establish the right of the bailor, at the termination of the bailment, to regain possession of the thing bailed, by means of replevin.

Judgment affirmed.

BOOK REVIEWS

Hand-book of International Law, BY GEORGE GRAFTON WILSON, West Publishing Company, St. Paul, Minn, 1910.

This is one of the best of the Horn Book series, which already contains several excellent treatises. Of the competency of the learned author, there could be no doubt. That the work produced by him is in every way worthy of the position that he holds as lecturer and professor in several important institutions, is evident from a careful examination of it. Its style is pellucid. Though terse, it is never obscure. Treating its topic historically, it exhibits in satisfactory manner, the important modifications of international law, caused by recent conventions of the important nations. Appendices contain the Declaration of Paris; the Instructions for the government of the armies of the United Strtes in the field; the Geneva Convention for amelioration of the condition of the wounded in armies in the field; the Hague conventions, and the Declaration of London of 1909. We know no other book which so succinctly, clearly and accurately, states the principles of the existing international law. It is pleasant to see (p. 43) still another concession that "The British proclamation of neutrality of May 14, 1861 was justified by President Lincoln's proclamation of a blockade on April 19th, 1861, which announced that action against vessels permissible only in time of war would be taken by the United States."

The Negotiable Instruments Law, by ARTHUR W. SELOVER. Second Edition by WILLIAM H. OPPENHEIMER. The Keefe-Davidson Co. St. Paul, Minn., 1910.

A somewhat careful examination of this new edition of Selover satisfies us of its great merit. It gives the language of the Negotiable Instrument law, and in connection therewith, the consentaneous decisions whether earlier or later than its enactment, not failing, however to note decisions that have been superseded by it. The arrangement, being that of the statute, is easily grasped, and decisions on any particular topic may be quickly found. The textual discussion is terse, and clear, and the notes ample. It seems to us that the book cannot fail to be as useful to practitioners of the law, who want to know what the courts have said upon any given provision of the Act, as to students of law not yet admitted to the bar.

The Constitution of the United States, by DAVID K. WATSON, LL. D. Callaghan & Co., Chicago, 1910.

This is easily one of the most important books that have appeared in the United States for a generation. Beginning with

an outline of the Constitution it traces the first suggestion of that instrument in chapter 3. It then takes up the classes of the articles seriatim. An interesting chapter deals with the Preamble. This is followed, in 25 chapters, by a discussion of the legislative power; its organ, its classes. The commerce power, the police power, the power to produce money and to borrow money, are treated illuminatively and with copiousness. Six important chapters deal with the executive; five with the judiciary. The chapter on the power of the courts to annul, for unconstitutionality, acts of congress and of the state legislatures, gives an interesting history of the development of that power. In the remainder of the 53 chapters composing the work, the other parts of the original constitution and the 15 amendments are lucidly and amply treated. Fifteen appendices contain important documents pertaining to the constitutional history of the United States.

We regret much the want of space, to dilate with something like the fulness which the extraordinary learning and thoroughness of the work deserves, upon its various salient excellences. Its preparation has required an immense learning, a cool discrimination, an open judgment, a rare power of analysis. The style of it is simple, and grave, comporting fully with the dignity of its great and impressive theme. The author is not unknown to the student of books, but this colossal and splendid achievement must be regarded as the greatest accomplishment of his laborious and fruitful life. We congratulate him on the completion of this Herculean enterprise.